

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PETER KOSTYSHYN,	§
	§
Defendant Below-	§ No. 455, 2010
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0902010151
Plaintiff Below-	§
Appellee.	§

Submitted: August 16, 2010

Decided: August 30, 2010

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

ORDER

This 30th day of August 2010, it appears to the Court that:

(1) On July 22, 2010, the Court received appellant’s “Notice of Appeal from Interlocutory Order.” Attached to appellant’s notice of appeal is a Superior Court form document rejecting a notice of appeal that appellant attempted to file in that court because the filing fee was not included. Appellant had attempted to appeal to the Superior Court from a Court of Common Pleas jury verdict finding appellant guilty of third degree assault, malicious interference with emergency communications, criminal mischief, offensive touching (three counts), menacing and disorderly conduct.

(2) The Clerk of this Court issued a notice pursuant to Supreme Court Rule 29(b) directing appellant to show cause why the appeal should not be dismissed for this Court's lack of jurisdiction to consider an appeal from the Court of Common Pleas.¹ Appellant filed a response to the notice to show cause on July 29, 2010. He asserts that he was denied his constitutional right to counsel in the Court of Common Pleas and then the Superior Court deprived him of his constitutional right to appeal when the Prothonotary refused to accept his notice of appeal for filing without prepayment of fees.

(3) The State has filed a reply to appellant's response. The State argues that appellant's appeal fails for two reasons. First, the Supreme Court has no jurisdiction to hear a direct criminal appeal from the Court of Common Pleas.² Second, this Court's jurisdiction in criminal cases is limited to appeals from final judgments.³ A criminal matter becomes final upon the imposition of sentence. Appellant was not sentenced until July 23, yet he filed his notice of appeal in this Court on July 22.

¹Del. Const. art. IV, § 11(1)(b).

² *Id.*

³*Eller v. State*, 531 A.2d 948, 950 (Del. 1987).

(4) The State is correct that this Court has no jurisdiction either to consider an interlocutory appeal in a criminal case or to consider a criminal appeal directly from the Court of Common Pleas. Moreover, it is clear that appellant's notices of appeal in the Superior Court and in this Court were both interlocutory because appellant was not sentenced until July 23. Despite this Court's lack of jurisdiction, however, we find that this matter must be returned to the Superior Court with instructions to accept appellant's notice of appeal as timely filed from his Court of Common Pleas sentencing.

(5) We find this to be the only appropriate remedy to rectify the Superior Court Prothonotary's error in refusing to accept appellant's notice of appeal for filing that court. It is not the function of the clerk of a court "to pass on the sufficiency of a notice of appeal which is tendered to [the clerk] for filing."⁴ The timely filing of a notice of appeal is mandatory and establishes the jurisdiction of an appellate court in Delaware. Therefore, *no* notice of appeal should ever be refused by a clerk for filing if the intention to appeal is clear from the document filed. Ultimately, whether a notice of appeal is legally sufficient to invoke a court's jurisdiction is a question of

⁴ *Graves v. General Insur. Corp.*, 381 F.2d 517, 519 (10th Cir. 1967).

law to be determined by a judge after notice to the appellant and an opportunity to be heard.⁵

(6) In this case, we find that the Superior Court Prothonotary's error in refusing appellant's notice of appeal for filing in that court ultimately deprived appellant of his right to perfect a timely appeal.⁶ Accordingly, we direct that the Superior Court accept appellant's notice of appeal for filing, *nunc pro tunc*, as of July 23, 2010, the date appellant was sentenced by the Court of Common Pleas.

NOW, THEREFORE, IT IS ORDERED, pursuant to Supreme Court Rule 29(b), that the within appeal is DISMISSED with directions to the Superior Court to accept appellant's notice of appeal for filing *nunc pro tunc* in that court. The Clerk of this Court is directed to provide a copy of this Order to the Superior Court Prothonotary forthwith.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

⁵ *United States v. Neal*, 774 F.2d 1022, 1023 (10th Cir. 1985).

⁶ *Bey v. State*, 402 A.2d 362, 363 (Del. 1979) (holding that an untimely appeal may be considered if the untimely filing is attributable to court-related personnel).